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No. 90-1465

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLUMBUS COUNTRY CLUB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fair Housing Act applies to the Columbus Country Club, a community of summer homes that requires homeowners to be members of the Roman Catholic Church.

2. Whether application of the Fair Housing Act to the Club violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A28) is reported at 915 F.2d 877. The decision and orders of the district court (Pet. App. A29-A40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1990. A petition for rehearing was denied on December 18, 1990. Pet. App. A1. The petition for a writ of certiorari was filed on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. Petitioner maintains a community of 46 summer homes, called bungalows, on a 23-acre tract of land along

[1] If petitioner's filing, which was styled a "Petition for Reargument in Banc," is deemed to be a suggestion for panel rehearing, it is out of time. See Sup. Ct. R. 13.4; *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1660-1662 (1990).

the Delaware River north of Philadelphia. Owners live in their bungalows only during the summer months. The property includes, in addition to the bungalows, a clubhouse, a barn for lawn care equipment, and a chapel. Petitioner's recreational facilities include a tennis court, playground, shuffleboard court, and a swimming area. Petitioner has a liquor license. Pet. App. A4.

Petitioner was organized in 1920 by the Knights of Columbus. In 1922, title to the land was conveyed to a separate non-profit corporation, which had as its stated purpose to "provide accommodations for social intercourse, outdoor sport, and healthful recreation" for members and their families. Pet. App. A4, A5. In 1924, the name of the organization was changed to the Columbus Country Club. In 1936, petitioner eliminated the requirement that members be affiliated with the Knights of Columbus, but continued to limit membership to Roman Catholic males. *Ibid.*

Petitioner is a non-profit organization that is owned and operated by 46 "annual members," one for each bungalow. The annual members own the land collectively; petitioner leases a bungalow lot to each annual member. C.A. App. 432-435. The lease agreement provides that each annual member shall improve the lot by building a bungalow, that petitioner has legal title to the bungalow, and that the annual member has a "quasi-proprietary interest" in the bungalow. *Id.* at 70, 432-433. Annual members may sell their interest in their bungalow, subject to certain conditions, to any person who qualifies as an annual member. *Id.* at 204-206, 433. Since 1970, there have been 31 transfers of ownership interests in bungalows; since 1968, four applicants have been rejected for annual membership. Pet. App. A4-A6, A30.

Prior to August 30, 1987, annual membership was limited to male Catholics. Widows of annual members could not become annual members, but were otherwise recognized as

bungalow owners. On August 30, 1987, petitioner revised its by-laws to permit women to become annual members, but did not alter the requirement that annual members be members of the Roman Catholic Church. Pet. App. A4-A6, A30, A31.

Petitioner also issues "associate" memberships and "social" memberships. An associate member may live in a bungalow and use the facilities on the grounds. A social member may use only the clubhouse. The current by-laws do not require either type of member to be male or Catholic.[2] Pet. App. A5.

Petitioner is not formally affiliated with the Roman Catholic Church or with any Catholic organization. Pet. App. A5. The Church did not order the formation of the Club or require that its members be Catholic. C.A. App. 68, 236-238, 247. Club documents, such as amendments to the by-laws, are not submitted to the Church for approval or review. *Id.* at 233. Prior to the August 1987 amendments, the "purpose" section of the petitioner's by-laws did not mention Catholicism or affiliation with the Catholic Church. Pet. App. A5.

In 1922, the Archbishop of Philadelphia granted special permission to celebrate masses at the Club each Sunday, and provided a priest from a nearby town for such services. In addition, some members say the rosary together in the evenings, and a statue of the Virgin Mary stands in an area near the entrance to the Club grounds known as the "grotto." Pet. App. A5, A30-A31.

2. This lawsuit stems from the efforts of Anita Gualtieri to become an annual member of the Club. Mrs. Gualtieri's father had been an annual member of the Club since the early 1950s. In due course, the family decided to transfer the property interest in the bungalow to Mrs. Gualtieri.

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[2] Prior to 1987, women were excluded from associate and social memberships. C.A. App. 421-422.

Because Mrs. Gualtieri was not a male, and her husband was not Catholic, neither was eligible for annual membership under the Club's by-laws. Pet. App. A6.

When Mrs. Gualtieri's inquiries into whether the Club would change its policies or grant an exception proved fruitless, she complained to the Archdiocese of Philadelphia. Her complaint focused on the Club's refusal to admit woman members. After an investigation, the Archdiocese sent a letter to the Club stating that the allegations were not unwarranted and threatening to withdraw permission to hold masses and the services of a priest. Pet. App. A6-A7, A31.

On August 30, 1987, petitioner revised its by-laws to make them gender-neutral. After the by-laws were amended, Mrs. Gualtieri again sought to become an annual member. The Board of Governors rejected her application. Pet. App. A6-A7.

3. In May 1987, Mrs. Gualtieri notified the Civil Rights Division of the United States Department of Justice of petitioner's membership policies. After an investigation, the United States filed suit against petitioner, alleging that it maintained a policy and practice of discriminating against persons in the sale or rental of dwellings, on account of religion and sex, in violation of the Fair Housing Act, 42 U.S.C. 3604.[3] Pet. App. A7.

The parties filed cross-motions for summary judgment. The district court initially declined to grant summary judgment on the sex discrimination claim or the claim that

[3] Section 804(a) of the Fair Housing Act prohibits the refusal to sell, rent, or otherwise make available dwellings on the basis of religion or sex. 42 U.S.C. 3604(a). Section 804(b) prohibits discrimination in the terms, conditions, or privileges of the sale or rental of dwellings on the basis of religion or sex. 42 U.S.C. 3604(b). Section 804(c) prohibits making statements with respect to the sale or rental of dwellings that indicate a preference, limitation, or discrimination based on religion or sex. 42 U.S.C. 3604(c).

Mrs. Guaitieri was denied membership in retaliation for complaining about discrimination. As to those claims, the court found that material facts were in dispute. As to the religious discrimination claim, however, the court concluded that petitioner was exempt from the Fair Housing Act under both the religious organization and private club exemptions of Section 807, 42 U.S.C. 3607.[4] Pet. App. A29-A39. The court held that, although the Club is not itself a religious organization, it is controlled by the Archdiocese of Philadelphia "[a]s a practical matter."[5] *Id.* at A36. In addition, the court held that petitioner met the private club exemption because it is private and provides "lodgings" "incident to" its primary purpose. *Id.* at A36-A38.

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[4] Section 807 (renumbered without substantive change as Section 807(a), 42 U.S.C. 3607(a), by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(d), 102 Stat. 1622-1623) provides:

> Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental, or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

[5] Contrary to petitioner's assertion (Pet. 7), the district court did not hold that the Club was operated "in conjunction with" the Roman Catholic Church. Rather, the court stated that "the persons who * * * have operated and controlled the club[ ] have done so 'in conjunction with' their continuing obligations as members of the Roman Catholic faith." Pet. App. A36.

Accordingly, the court granted the petitioner's motion for summary judgment on the religious discrimination claim. *Id.* at A39.

The United States filed a motion for reconsideration noting that the private club exemption, if it applies, exempts the Club from claims of sex discrimination as well as religious discrimination. Pet. App. A7. Upon reconsideration, the district court entered judgment for the petitioner. *Id.* at A7, A40.

4. The court of appeals reversed and remanded. Pet. App. A2-A28. As an initial matter, the court held that the bungalows are "dwellings" within the meaning of the Act. *Id.* at A8-A11. The Act defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence." 42 U.S.C. 3602(b). The court reasoned that, because annual members inhabit their bungalows for a significant period of time, they fall within the ordinary meaning of "residence." Pet. App. A10-A11. The court rejected the contention that the Fair Housing Act applies only to year-round residences. *Id.* at A11.

The court concluded that petitioner did not meet the religious organization exemption. Pet. App. A12-A16. The court observed that "defendant does not dispute that it is not itself a 'religious organization.'" *Id.* at A12. Thus, the relevant question is whether petitioner is "operated, supervised or controlled by or in conjunction with" a religious organization. *Id.* at A12-A13 (quoting 42 U.S.C. 3607(a)). The court held that petitioner had not shown that it was controlled by or operated "in conjunction with" the Catholic Church. Pet. App. A14-A15. To meet this standard, the court said,

> there must be a mutual relationship between the non-profit society and a religious organization. The

> existence of this relationship cannot depend solely on the activities of the non-profit organization nor be viewed only from its perspective. Indeed, evidence of the club's unilateral activities would go to whether it is itself a religious organization not to whether it is operated "in conjunction with" a religious organization. Furthermore, the Church's ability to withdraw permission to hold mass and the fact that on one occasion it may have indirectly influenced the club's Board of Governors by threatening to do so are not enough. Without further evidence of interaction or involvement by the Church, we cannot conclude that as a matter of law the Church controlled the defendant or that the defendant was operated "in conjunction with" the Church.

Id. at A15-A16.

The court also held that petitioner did not qualify for the private club exemption. Pet. App. A16-A20. The court concluded that petitioner did not provide "lodgings" within the meaning of the exemption because the bungalows are used as residences, not temporary accommodations. *Id.* at A18-A19. Moreover, petitioner does not qualify for this exemption because it applies only to the "rental or occupancy" of lodgings, not to their sale. *Id.* at A19-A20.

The court of appeals declined to address petitioner's arguments that application of the Fair Housing Act to the Club violated the Free Exercise and Establishment Clauses of the First Amendment and Club members' First Amendment associational rights. The court explained that it "preferr[ed] to have the district court consider [these arguments] in the first instance." Pet. App. A20.

Judge Mansmann dissented. Pet. App. A21-A28. She concluded that the Club met the Act's religious organization exemption. In Judge Mansmann's view, neither con-

trol nor mutuality determines whether an organization falls within the exemption. She concluded that the significant connections between petitioner and the Church are sufficient to bring it within the exemption. *Id.* at A25-A26. In addition, she concluded that petitioner met the mutuality standard. *Id.* at A26-A28.

ARGUMENT

1. Petitioner contends (Pet. 11-18) that this Court should grant certiorari to consider the First Amendment issues raised by application of the Fair Housing Act to the Club. Review of any constitutional issues that may be presented by this case would be premature. Not only is the court of appeals' decision interlocutory, but neither the court of appeals nor the district court has yet addressed the merits of petitioner's constitutional arguments. If, on remand, the district court finds that the Club has violated the Act, and that application of the Act to the Club does not violate the First Amendment, petitioner will have an opportunity to seek review of the constitutional issues, including, if warranted, review by this Court. Consequently, there is no reason for the Court to depart from its usual practice of declining to review interlocutory decisions, see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), and particularly of declining to review questions that have not been addressed by the courts below. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927).

In any event, petitioner's First Amendment claims are unpersuasive. Petitioner contends (Pet. 11-14) that applica-

tion of the Act to the Club would violate the members' right of expressive association by interfering with the Club's "genuine associational purpose [of] religious expression." Pet. 14. But there is no evidence that permitting non-Catholics to own bungalows would significantly interfere with the ability of Club members to engage in group efforts in pursuit of their religion. Moreover, the government's interest in eradicating discrimination in housing, which is compelling and unrelated to the suppression of expressive activity, outweighs any incidental burden that permitting non-Catholics to own bungalows may have on members' associational rights. See generally *Board of Directors of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537 (1987); *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984).

Petitioner also contends (Pet. 14-17) that application of the Act to the Club would violate the Free Exercise Clause. As the Court has recently made clear, however, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div., Dep't of Human Resources* v. *Smith*, 110 S. Ct. 1595, 1600 (1990). Petitioner fails to cite *Smith*. And even prior to *Smith*, it was clear that the policy of the Fair Housing Act—to provide opportunities for home ownership to all persons, without regard to religion—does not violate the Free Exercise Clause. Cf. *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (rejecting contention that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions").

Finally, petitioner contends (Pet. 17-18) that application of the Act to the Club would violate the Establishment Clause by requiring excessive government entanglement with religion. The Court has recognized that "routine regulatory interaction which involves no inquiries into religious doctrine * * *, no delegation of state power to a religious body * * *, and no 'detailed monitoring and close administrative contact' between secular and religious bodies * * * does not of itself violate the nonentanglement command." *Hernandez* v. *CIR*, 490 U.S. 680, 696-697 (1989). See also *Jimmy Swaggart Ministries* v. *Board of Equalization*, 110 S. Ct. 688 (1990); *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985). Moreover, the courts of appeals have held that application of Title VII and related employment discrimination laws to religious organizations does not result in excessive entanglement. See, *e.g.*, *EEOC* v. *Fremont Christian School*, 781 F.2d 1362, 1369-1370 (9th Cir. 1986); *EEOC* v. *Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1281-1282 (9th Cir. 1982); *EEOC* v. *Mississippi College*, 626 F.2d 477, 486-488 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981). There is no evidence that application of the Fair Housing Act to the Club would result in the kind of inquiry into religious doctrine or detailed monitoring that might violate the Establishment Clause.

2. Petitioner also contends (Pet. 19-25) that the Club is exempt from the anti-discrimination provisions of the Fair Housing Act. The court of appeals' decision to the contrary is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, this is the first reported decision of a court of appeals to consider the application of either the religious organization exemption or the private club exemption.[6] Thus, further review is not warranted.

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[6] In *United States* v. *Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975), the court held that the religious organization

a. The court of appeals correctly concluded that petitioner does not fall within the religious organization exemption because it is not "operated, supervised or controlled by or in conjunction with a religious organization, association, or society."[7] 42 U.S.C. 3607(a). The court of appeals' conclusion that the religious organization exemption contemplates a "mutual relationship" between the religious organization and the other organization is supported by the language of the exemption, its legislative history, and common sense. "Conjunction" means the "the state of being conjoined"; "conjoin," in turn, means "to join together (as separate entities) for a common purpose." *Webster's Ninth New Collegiate Dictionary* 277 (1984). Thus, the court of appeals was correct that "conjunction" implies a mutual relationship. In addition, the legislative history indicates that Congress's intention was to exempt religious institutions, such as churches and the various agencies, departments, and organizations under their control.[8] An organization cannot

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exemption was "inapplicable by its terms" to a private non-sectarian children's home because it was not a religious organization and the basis for discrimination was not religion.

[7] In its petition, petitioner contends (Pet. 19-20) that the Club is a religious organization within the meaning of the Act. Petitioner abandoned this argument in the court of appeals. See Pet. App. A12. In any event, the district court was correct in concluding (*id.* at A36) that petitioner is not a religious organization. Cf. *EEOC* v. *Townley Engineering & Mfg. Co.*, 859 F.2d 610, 617-618 (9th Cir. 1988) (Title VII's exemption for religious corporations and associations applies to "only those institutions with extremely close ties to organized religions * * *. Churches, and entities similar to churches, were the paradigm."), cert. denied, 489 U.S. 1077 (1989).

[8] The language of the religious organization exemption derives from a February 6, 1968, fair housing bill that Senators Mondale and Brooke introduced on the Senate floor. 114 Cong. Rec. 2270 (1968). On February 28, 1968, Senator Dirksen introduced his own fair housing bill "in the nature of a substitute." 114 Cong. Rec. 4570-4573 (1968).

exempt itself from the Fair Housing Act by unilaterally deeming itself to be, or conducting itself as if it were, connected to or affiliated with a religious organization.[9]

The court of appeals' conclusion that the Club lacked the requisite relationship with the Roman Catholic Church to qualify for the exemption is fact-bound and, in any event, correct. There is no formal or legal relationship between the Club and the Church or any Catholic umbrella organization. The Church neither mandated the formation of the Club nor required it to restrict its membership to Catholics. The Club's affairs are controlled by its Board of Governors; Club documents are not submitted to the Church for review or approval. Although the Church permits religious services to be conducted on the premises and provides a priest for this purpose, that is not sufficient to give the Church control over the Club. If the Church rescinded the privilege of

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The Dirksen bill, with modifications, was enacted as the Fair Housing Act; the Act retained the religious organization exemption of the Mondale-Brooke bill. See generally *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 147 n.29 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). A summary of Senator Mondale's proposal states that "[a]ll housing other than exempted housing of religious institutions would be covered," and that "religious institutions could continue to give preference in housing to persons of their own religion." 114 Cong. Rec. 2272 (1968). In addition, Senator Scott, in discussing Senator Mondale's proposal, stated that "[r]eligious institutions, or schools and other agencies affiliated with them, may give preference in housing to persons of their own religion despite the act." 114 Cong. Rec. 3252 (1968).

[9] The court of appeals correctly rejected petitioner's argument that the exemption should be read broadly. See Pet. App. A14-A15. Although the prohibitions of the Fair Housing Act are broad and inclusive, the exemptions are narrow and limited. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) ("The language of the Act is broad and inclusive."); *United States* v. *Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975) ("Congress created a carefully limited exemption for certain religious organizations.").

conducting masses on the premises, the Club would continue as a recreational homeowners' association.[10]

b. The court of appeals was also correct in holding that petitioner falls outside the private club exemption. That exemption applies only to the "rental or occupancy" of "lodgings." Petitioner's bungalows are sold rather than rented, and they are "dwellings" rather than temporary lodgings.

Congress deliberately deleted the word "sale" from the private club exemption.[11] As enacted, the exemption applies only to the "rental or occupancy" of otherwise qualifying lodging. Consequently, the court of appeals was correct in concluding that petitioner's "policy and practice of discriminating against persons in the sale of bungalows falls outside the plain language of the private club exemption." Pet. App. A19-A20. Petitioner's suggestion (Pet. 24-25) that it restricts only the rental and occupancy of bungalows is

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[10] If a church agreed to send a priest or minister to conduct services at a local retirement community, that would not entitle the community to discriminate on the basis of religion.

[11] The private club exemption was introduced in Senator Dirksen's amendment to his own substitute bill. 114 Cong. Rec. 4690 (1968); see note 8, *supra*. The original language of the exemption provided:

> Nor shall anything in this title prohibit a bona fide private club from limiting the sale, rental, or occupancy of dwellings which it owns or operates for other than a commercial purpose to members of the club or from giving preference to such members.

114 Cong. Rec. 4690 (1968) (emphasis added). Senator Kuchel subsequently introduced an amendment, which was adopted, that substituted the word "lodgings" for "dwellings," deleted the word 'sale,' and added the language "as an incident to its primary purpose or purposes." 114 Cong. Rec. 5526 (1968). Senator Kuchel stated that his amendment "seeks to tighten up the exemption" to "eliminate, for example, the possibility of a developer attempting to discriminate in the sale of tract homes by labeling the tract a private club." *Ibid.* He added that "[w]e are dealing here with the rental of property—that is to say, lodging in a bona fide private club." *Ibid.*

simply wrong. Mrs. Gualtieri did not want simply to rent or occupy a bungalow, she wanted to purchase her family's property interest in the bungalow. See Pet. App. A6. This case arose because petitioner refused to permit that sale.

In addition, the court of appeals was correct in drawing a distinction between residential "dwellings" and temporary "lodgings," and in concluding that petitioner's bungalows are dwellings rather than lodgings. The statute defines a "dwelling" as a building or structure that is designed or intended to be a "residence." Section 802(b), 42 U.S.C. 3602(b). Although the statute does not define "lodging," the legislative history indicates that Congress substituted the word "lodgings" for the word "dwellings" to narrow the private club exemption. See note 11 *supra*. Congress's deletion of residential structures from the proposed exemption suggests that it intended to exempt only temporary or transient occupancy (*i.e.*, in lodgings), not occupancy intended to endure for some substantial period of time (*i.e.*, in a dwelling). This reading of the statutory language is reinforced by the fact that Congress eliminated the word "sale" (which may apply to owner-occupied dwellings, but not to lodgings) from the statute. See *ibid.* Because the bungalows serve as Club members' primary residence during the summer, they are dwellings and not lodgings.[12]

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[12] Petitioner is not eligible for the private club exemption for two additional reasons. First, the bungalows are not offered as "an incident to [the Club's] primary purpose or purposes," 42 U.S.C. 3607(a), because the primary purpose of the Club is to provide owner-occupied seasonal dwellings for its members. Second, petitioner is not "a private club not in fact open to the public," *ibid.*, because it is not genuinely selective on a basis other than sex or religion.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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